



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION ON REHEARING

MRA/145118

PRELIMINARY RECITALS

Pursuant to a petition filed November 09, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance (MA), a hearing was held on January 15, 2013, at Kenosha, Wisconsin. A rehearing request was made on February 13, 2013 and granted on February 22, 2013. A rehearing was held on March 12, 2013.

The issue for determination is whether the agency has correctly determined the petitioner's eligibility for Institutional – MA.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Mark J. Rogers
401 E Kilbourn Ave Suite 400
Milwaukee, WI 53202

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Kathi Tolnai, ESS

Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. Petitioner applied for Institutional – MA on August 29, 2012. Exhibit 1.
3. During the course of processing the application, the agency determined the value of petitioner's total assets to be \$194,065.61. The asset limit was determined to be \$115,640.
4. On November 1, 2012 the agency issued a notice of decision to petitioner stating that she was ineligible for MA because she was over the asset limit. Exhibit 9.
5. The petitioner's assets include a residential property that is owned by the George Crow Living Trust, a revocable trust. The trustee of that revocable trust is George Crow, petitioner's community spouse, and their son John S. Crow.
6. The George Crow Living Trust rents the property for \$650 monthly. George Crow receives the rent from this property and uses it for his and petitioner's expenses.
7. In 2010 and 2011 George Crow and petitioner filed a Schedule E for their tax purposes. The Schedule E was filed for the residential rental property. The rents received in 2010 were \$7150, and 2011 were \$7800.

DISCUSSION

Institutional MA certification is available *if all conditions of eligibility*-- including meeting the asset test-- are satisfied. See Wis. Admin. Code §§DHS 103.08(1) and DHS 103.075(5)(a) and (b). In this case, the application was filed in August 2012, and MA certification was requested effective August 1, 2012 pursuant to that application. The issue that holds up petitioner's MA eligibility is passing the asset test. There is only one asset in question and that is the residential property from which the George Crow Living Trust, by way of the Trustee - petitioner's community spouse – receives rental income. The agency counted the assets and found their total assets to be \$194,065.61, with an asset limit of \$115,640. As the available assets were greater than the asset limit, petitioner was found ineligible for MA due to excess assets. See also Wis. Admin. Code §DHS 103.075(5)(b)3.

Petitioner's representative argues that this rental property is a business asset and should be exempt from being considered against their asset limit. To show that this is a business, petitioner's Schedule E's were presented from 2010 and 2011 to show that rental income was reported for tax purposes as self-employment. Exhibit 4 and 6. The argument then goes that this should be exempted as a business asset pursuant to the *Medicaid Eligibility Handbook (MEH)*, §15.6.3.1, which provides in relevant part:

Business assets are generally income producing property. Exclude assets directly related and essential to producing goods or services. In EBD cases, all real and non-real business property is exempt if the business is currently operating for the self-support of the EBD individual. There is no profitability test. Note: See 16.9 Non-Home Property Exclusions.

MEH, §15.6.3.1.

In the original decision in this matter, I found that that this rental property was not exempt as a business asset because it was not “currently operating for the self-support of the EBD individual.” The rehearing request was made because petitioner argues that the rental property was operating for petitioner's support and that it qualifies as a business asset so as to be exempt from the asset test.

Petitioner argues that the rental property here is a business and therefore an exempt asset because it meets the definition of an exempt business asset per the *MEH*, §15.6.3.1. Petitioner also argues that the POMS

cited by the agency was inapplicable and that the MEH requires otherwise as a “less restrictive” method for determining eligibility. The agency maintains that it does not consider the rental property a business asset.

State MA programs are required to be "no more restrictive" in their methodology for determining MA eligibility than are the federal SSI regulations. See 42 U.S.C. §1396a(a)(10)(C)(i) and 42 U.S.C. §1396a(r)(2)(A). A state may establish different MA eligibility criteria, so long as under the state criteria, "additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance." See 42 U.S.C. §1396a(r)(2)(B). The SSI POMS contain the federal SSI eligibility requirements.

The agency described how it determines if an asset like the rental property here qualifies as a “business” or “nonbusiness” property. The agency explained that it looks at whether the individual is claiming the rental income as “business” income. The agency looked at POMS Section SI 01130.501 for guidance. That POMS states in relevant part that the agency looks at the following:

C. Development and documentation — property used in a trade or business

1. Trade Or Business Not Being Excluded

When an individual alleges owning trade or business property not already being excluded, consider if a valid trade or business exists, and if the property is in current use (see SI 01130.504). Obtain the individual’s statement either signed or recorded on a DROC giving the information below. Absent evidence to the contrary, accept the responses to items a.-d. Verify e. with the business tax returns.

- a. a description of the trade or business;
- b. a description of the assets of the trade or business;
- c. the number of years it has been operating (see 4. below);
- d. the identity of any co-owners;
- e. the estimated gross and net earnings of the trade or business for the current tax year (see 3. below).

2. Redetermination Of Excluded Trade Or Business Property

Consider current use of the property in the trade or business. Obtain and verify the individual's allegations as to the estimated gross and net earnings of the trade or business for the current tax year for income purposes (see SI 00820.230).

3. Use Of Tax Returns

a. Use Most Recent Tax Return

Obtain a copy of the business tax return (i.e., Form 1040 and the appropriate schedules) for the tax year prior to the application or redetermination. Use the return to determine the net earnings from self-employment and validity of the trade or business. The following can be particularly helpful:

- Schedule C, Profit or Loss from Business or Profession;
- Schedule SE, Computation of Social Security Self-Employment;
- Schedule F, Farm Income and Expenses;
- Form 4562, Depreciation and Amortization; and
- Form 1065, U.S. Partnership Return of Income.

POMS Section SI 01130.501C.3., available online at <https://secure.ssa.gov/apps10/poms.nsf/lnx/>

Because the POMS here does not list a Schedule E as a business tax return, it is not considered a business asset for the purposes of the State MA eligibility determination; it is considered a nonbusiness income producing property. Therefore, the agency then looks to see if the nonbusiness income producing property can be exempted in the asset calculation. One of the POMS at section SI 01130.503(B)(1) reflects the *MEH* provision at §16.9 which provides:

Non-home property is any countable asset other than a *homestead*. See 17.4 Exceptions for divestment. Exclusions of non-home property in EBD cases include:

1. Real property that is listed for sale with a realtor at a price consistent with its fair market value
2. Property excluded regardless of value or rate of return. Property used in a trade or business is in this category. See 15.6.3.1 Business Assets.
3. Property excluded up to \$6,000, regardless of rate of return. This category includes non-business property used to produce goods or services essential to self-support. Any portion of the property's equity value in excess of \$6,000 is not excluded.

Non-business property essential to self-support can be real or personal property. It produces goods or services essential to self-support when it is used, for example, to grow produce or livestock solely for personal consumption, or to perform activities essential to the production of food solely for home consumption.

4. Property excluded up to \$6,000 if it is non-business property that produces a net annual income (either cash or in-kind income) of at least 6%.

If the excluded portion produces less than a 6% return due to circumstances beyond the person's control (e.g., crop failure, illness), and there is reasonable expectation that it will again produce at least a 6% return, continue to consider the first \$6,000 in equity as excluded.

Again, as in the original decision in this matter, there is no evidence that the property is listed for sale, so exclusion #1 does not apply. Exclusion #2 does not apply because, as stated above, it does not qualify as a business asset. To argue that the *MEH* is more or less restrictive than the POMS in this instance is incorrect; the state MA agency here is following the same federal eligibility requirements and is applying them consistently as a matter of policy with respect to the type of asset here. The section of the *MEH* that petitioner argues shows that the agency should be considering this asset as a business asset is §15.6.2.2 which lists the Schedule E as one of the forms to look at when determining if it is a business. However, not only does this portion of the *MEH* relate to determining self-employment *income*, as opposed to assets, the *MEH* also provides:

Business assets are generally income producing property. Exclude assets directly related and essential to producing goods or services.

In EBD cases, all real and non-real business property is exempt if the business is currently operating (15.6.1.3 Operating) for the self-support of the EBD individual. There is no profitability test.

Note: See 16.9 Non-Home Property Exclusions.

MEH §15.6.3.1 (emphasis added). Thus, we get brought back to the same provision cited above.

Finally, I reiterate that Exclusion #3 does not apply because there is no evidence that this is a nonbusiness property that is used to produce goods or services essential to self-support. I also agree that the agency was correct in stating that the fourth exclusion does not apply because the net annual income does not reach the 6% mark, and there is no evidence that the return is less than 6% due to circumstances beyond their control. There was no dispute at hearing regarding the net rent determined or that it was less than a 6% net annual return. Given the evidence before me, I find that the agency correctly included the rental property as a countable available asset to the petitioner and that therefore she is ineligible for MA due to excess assets.

CONCLUSIONS OF LAW

The agency has correctly determined that the petitioner is not eligible for Institutional – Medical Assistance due to excess assets.

THEREFORE, it is

ORDERED

That the petition for review herein be dismissed.

APPEAL TO COURT

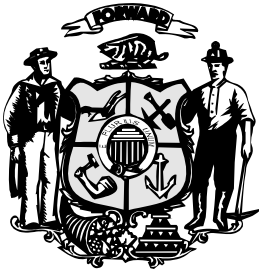
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 2nd day of May, 2013

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 2, 2013.

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Division of Health Care Access and Accountability
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